Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04873/2016

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 6 March 2018	**On 28 March 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Profumo, instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mr K Hibbs, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Ethiopia who was born on [ ] 1988. She came to the United Kingdom on 7 December 2015. On 24 December 2015, she claimed asylum. The basis of her claim was that she had been a supporter of the opposition group in Ethiopia known as "Ginbot 7". She claimed that her sister, brother and father had been arrested and detained by the Ethiopian authorities and that she was wanted because of her involvement with Ginbot 7 which included distributing leaflets since 2013.

3. On 28 April 2016, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

4. The appellant appealed to the First-tier Tribunal. Judge Brewer found the appellant not to be credible and rejected her account and found that she would not be at risk on return to Ethiopia. The judge also rejected the appellant's claim under Art 3 and Art 8, relying in part upon her mental health problems. The judge dismissed the appellant's appeal on all grounds.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal on essentially two grounds. First, the judge erred in law by failing to treat the appellant as a "vulnerable witness" and in failing to take into account her mental health problems in assessing the credibility of her evidence. Secondly, in rejecting the appellant's account, the judge had given illogical and inadequate reasons.

6. Permission to appeal was initially refused by the First-tier Tribunal but on 6 September 2017 the Upper Tribunal (DUTJ Hutchinson) granted the appellant permission to appeal.

7. On 3 October 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision.

The Submissions

8. On behalf of the appellant, Ms Profumo relied upon the two grounds set out in the "grounds of renewal" upon which permission to appeal was granted.

9. As regards Ground 1, she submitted that the judge had failed to treat the appellant as a vulnerable witness in accordance with the *joint Presidential Guidance Note No 2 of 2010* issued by the (then) President of UTIAC and the acting President of FtTIAC.

10. Ms Profumo submitted that the evidence showed that the appellant suffered from "manic psychotic episodes" which had led to her being 'sectioned' five days after the asylum interview on 25 April 2016 and also in February 2017 prior to the hearing. The judge had not taken into

account the impact which the appellant's mental health might have had upon her evidence when assessing her credibility. Ms Profumo submitted that the judge had only taken into account the evidence of the appellant's mental health after he had already reached a finding (in para 66) that the appellant's account was not credible.

11. Ms Profumo also raised the issue that the judge had failed to treat the appellant as a vulnerable witness at the hearing. She accepted that the appellant's (then) Counsel and legal representatives had not raised these matters before the judge but, she submitted, it was incumbent upon the judge to consider the issue of the appellant's vulnerability even if it were not raised by the appellant's representatives.

12. Ms Profumo relied upon the decision of the Upper Tribunal in JL (Medical reports – credibility) China [2013] UKUT 00145 (IAC) as to the importance of taking into account an individual's "vulnerabilities" when assessing their evidence. In addition, she relied upon the important decision of the Court of Appeal in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 on the importance of dealing fairly with vulnerable witnesses and appellants at a hearing and in assessing their evidence in accordance with the joint Presidential Guidance Note.

13. In relation to ground 2, Ms Profumo submitted that the judge's reasons in para 66 were deficient. She submitted that it was wrong for the judge to doubt the veracity of the appellant's evidence on the basis that the Ethiopian authorities could have arrested the appellant before she left Ethiopia on 7 December 2015. Ms Profumo submitted that the appellant's case was that the authorities only became aware of her involvement with Ginbot 7 when her family (in particular her brother who was a member of Ginbot 7) was arrested and detained after the appellant came to the UK and she was told about their arrest by her sister after her sister was released.

14. Further, Ms Profumo submitted that the judge had failed properly to reason that it was implausible that the authorities would not "simply await her return and arrest her as she stepped off the plane"; in the absence of any evidence that the authorities knew where she was and that she would come back to Ethiopia. There was, Ms Profumo submitted, no background evidence to support the judge's inference that the authorities had the "wherewithal" to discover her whereabouts and when she would return.

15. On behalf of the Secretary of State, Mr Hibbs submitted in relation to ground 1 that the medical evidence did not provide any basis upon which the judge could have found that the appellant's evidence would be affected by her mental health problems. There was no evidence that she was suffering from any mental health problems at the time of the interview even though she was sectioned only five days later. There was nothing in the medical evidence, Mr Hibbs submitted, upon which the judge could have found that her evidence was affected by her mental health. He pointed out that there had been a pre-hearing review on 7

September 2016 and the appeal, initially listed on 21 September 2016, had been adjourned in order that the respondent could consider whether to re-interview the appellant. In the result, the respondent had chosen not to do so but, as was clear from paras 8 and 9 of the judge's determination, both representatives at the hearing before Judge Brewer agreed that the appeal should proceed and not be adjourned in order to obtain further medical evidence and a firm diagnosis of the appellant's mental health.

16. As regards ground 2, Mr Hibbs submitted that the judge's reasoning was sustainable. He relied upon the appellant's evidence, set out at para 65 of the judge's determination, that her family were arrested because the family "cannot bring me back to the authority" and "they asked them to bring me back". He submitted that, therefore, it was clear that the appellant was wanted prior to her family's arrest.

17. Mr Hibbs invited me to uphold the judge's decision.

Discussion

18. The judge's findings are at paras 54–66 of his determination. As will become clear, he accepted some aspects of the appellant's account, including her detention in 2010 but not that it was for any political reasons as she had not become politically active until 2013. However, he found her to lack credibility as regards the core of her claim, namely that she had been involved with Ginbot 7 since 2013 and that her family had been arrested and detained and that she was wanted by the Ethiopian authorities. The judge's reasons were as follows:

> "54. I make the following findings of fact:
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> 55. The Appellant is an Ethiopian, she was born on 16 December 1988.
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> 56. She was imprisoned for 10 days in Ethiopia in 2010 and then released.
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> 57. She had no further difficulties with the authorities.
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> 58. She travelled to the UK to attend a conference as part of her job, on 7 December 2015.
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> 59. She applied for asylum on 24 December 2014.
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> 60. I consider that the Appellant's account as set out in her asylum interview and at the hearing lacked credibility for the following reasons.
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> 61. The imprisonment in 2010 was not related to political activity as on the Appellant's own evidence she was not politically active until 2013, when she started leafleting for Ginbot. Thus, this is immaterial to her application. I pause to note that at the hearing the Appellant did say that during this period of imprisonment she was slapped, but in her Asylum Interview she stated that she had not been 'mistreated' whilst in prison. I consider her statement about being slapped an embellishment to bolster her claim.

62. On her own evidence the Appellant was politically active from 2013 until she left Ethiopia in December 2015, a period of 2 years during which she encountered no difficulties with the authorities in Ethiopia.

63. The evidence in the form of flight details shows that the Appellant was due to travel back to Ethiopia on 13 December having arrived on 7 December, attended the conference over 9 and 10 December and then taken a couple of days' holiday. The telephone call with her sister apparently took place on 22 December. The reason the Appellant was still in the UK at that time was, she said, because she had asked her employer if she could extend her stay. She said that she could not remember exactly when she asked this, but it was agreed and indeed there are details in the Appellant's bundle of a new return flight on 24 December 2015.

64. Her account of her telephone call with her sister was rather vague and confused. She said that her sister had been held for 3 days after having been arrested at the same time as her brother and father. After release, her sister was hospitalised for a period and on release, called the Appellant.

65. The Appellant confirmed that her sister was not held with either her brother or her father. Ashe also confirmed that her sister had not spoken to either her brother or her father when she called the Appellant on 22 December. This begs the question how could the Appellant's sister know what was said either to the brother or father? At the Asylum interview the Appellant's evidence was that the arrests were made because the family 'cannot bring me back to the authority'. She said, 'they asked *them* to bring me back…' (my emphasis). At the hearing, she added that the authorities had come with an arrest warrant for her.

66. But there is some difficulty with this evidence. The authorities, had they wished to arrest the Appellant, could have done so before 7 December 2015. Further, if they were looking for her they would presumably have had little difficulty discovering her flight details. Why not simply await her return and arrest her as she stepped off the plane? It was not suggested that her family were hiding her, the authorities had an arrest warrant, so why was there any mention of the family not being able to produce her to them? The account is simply not credible."

19. It is plain from these paragraphs that the judge did not take into account whether the appellant was a vulnerable person and the impact, if any, upon her evidence of her mental health issues. He dealt with the latter under the heading "medical issues" at paras 67–73 as follows:

"67. The Appellant's medical evidence is credible.

68. I have seen 3 letters all detailing an apparently serious, albeit not fully diagnosed, mental impairment.

69. On 25 April 2016, the Appellant suffered a manic psychotic episode and was sectioned under the Mental Health Act. She is reported to have exhibited 'bizarre disinhibited behaviour the

details of which I do not need to repeat here but they are set out in detail in the letter of 8 September 2016 from Dr Yerassimou, Consultant Psychiatrist, Cardiff and Vale University Health Board.

70. On 2 June 2016, the Appellant was discharged from hospital and prescribed anti-psychotic medication. She is under the care of the Cardiff and Vale University Health Board's Crisis Resolution and Home Treatment Team which is an alternative to in-patient care, the implication being that without this the Appellant would be an in-patient. In mid-2012 the Appellant was receiving daily home visits.

71. Dr Yerassimou's diagnosis was that the Appellant's symptoms come and go, so for example by late 2016 she was felt to be becoming psychotic again, experiencing visual and auditory hallucinations. It is possible that the Appellant is suffering from Bi-polar disorder, but this is difficult to diagnose definitively.

72. The Appellant relapsed in February 2017 and was admitted to the John Radcliffe hospital in Oxford again under section.

73. Dr Yerassimou's opinion, which I unreservedly accept, is that The Appellant is extremely unwell, she needs ongoing psychiatric input, she has had 2 significant psychotic episodes in less than 12 months and she is at risk should she become ill again. Dr Yerassimou describes the Appellant as having severe and significant health needs."

20. As will be plain, the judge accepted the medical evidence, such that it was, set out in three letters: one from Kathryn Blow, a Community Mental Health Nurse at the Cardiff and Vale University Health Board dated 12 June 2016 (at page 23 of the appellant's bundle), a letter from Dr Yerassimou, a Consultant Psychiatrist with the Cardiff and Vale University Health Board dated 8 September 2016 (at pages 24 and 25 of the appellant's bundle) and a further letter from Dr Yerassimou dated 24 May 2017 (contained within the appeal file). Those letters, in particular the latter two, are accurately summarised by the judge at paras 69–73. As the judge points out, the appellant has "severe and significant health needs" which led to her being sectioned under the mental health legislation in April 2016 (five days after the asylum interview) and again in February 2017. She suffers from "manic psychic episodes" exhibiting, at the relevant times, "bizarre" behaviour and experiencing "visual and auditory hallucinations". The most recent letter states that she is currently prescribed anti-psychotic and anti-depressant medication. That letter also points out that having suffered "two significant psychotic episodes in the space of less than twelve months" that "stressful situations are one of her relapse indicators".

21. There is little doubt that the appellant is, for the purposes of the relevant guidance, a "vulnerable" person. In principle, therefore, the guidance applied. It matters not that the appellant's (then) representatives did not invite the judge to treat the appellant as a vulnerable witness, it was clearly incumbent upon the judge, given the evidence before him, to consider that issue and had he done so he would no doubt have reached

the same conclusion as I have that the appellant is indeed a "vulnerable" witness. It is wholly unclear to me why this issue was not raised before the judge; it plainly should have been.

22. The importance of applying the guidance in an appropriate case was emphasised by the Court of Appeal in AM (Afghanistan). Indeed, the Senior President of Tribunals, Sir Ernest Ryder (with whom Gross and Underhill LJJ agreed) said at [30] that a "[f]ailure to follow [the guidance] will most likely be a material error of law".

23. At para [31], the Senior President set out, in agreement with submissions made on behalf of the Lord Chancellor in that case, five key features of the joint Presidential Guidance Note and the Practice Direction of the Senior President, "First-tier and Upper Tribunal: Child, Vulnerable Adult and Sensitive Witnesses (30 October 2008) as follows:

> "31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:
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> a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
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> b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that 'the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so' (PD [2] and Guidance [8] and [9]);
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> c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
>
> d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
>
> e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27])."

24. Further, at para [21] (agreeing with the submissions made on behalf of the appellant in that case), the Senior President dealt with the importance of considering the circumstances of a child or vulnerable witness when assessing their evidence in an asylum claim as follows:

> "21. It is submitted on behalf of the appellant that the agreed basis for allowing the appeal on the merits reflects core principles of asylum law and practice which have particular importance in claims from children and other vulnerable persons namely:

a. given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';

b. while an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;

c. the findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;

d. expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and *JL (medical reports – credibility) (China)* [2013] UKUT 00145 (IAC), at [26] to [27]);

e. an appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and

f. in making asylum decisions, the highest standards of procedural fairness are required."

25. There was, of course, no assessment by the judge in this case of whether the appellant was a vulnerable witness and therefore whether there was any need for procedural safeguards at the hearing, including (as the court in AM (Afghanistan) makes clear) whether it was necessary for the appellant to give evidence at all.

26. Further, the judge did not have any regard to the appellant's mental health issues in assessing her credibility. The fact that the appellant's (then) representative did not, as Ms Profumo acknowledged, make any submissions in that regard, it was, in my judgment, if the guidance and approach emphasised in AM (Afghanistan) was to be followed, incumbent upon the judge to take it into account. Although the evidence before the judge was not in the form of an expert report specifically addressing the impact upon the appellant's evidence of her mental health issues, it did raise clear warning 'flags' that her evidence should be treated with some caution when it related to what she said five days before her condition was so severe that she was sectioned under the relevant mental health legislation suffering from a "manic psychotic episode" when she was

described as being “floridly psychotic” such that she became: “fixated on a broom handle which she believed was holy, she was banging and shouting on the table, agitated and pacing and had multiple grandiose beliefs”.

27. In addition, she was experiencing visual and auditory hallucinations. As the letter of 24 May 2017 from Dr Yerassimou points out, “stressful situations are one of her relapse indicators”. An asylum interview would, no doubt, potentially fall within that rubric.

28. I accept that the evidence was not as clearly indicative of a potential impact upon the appellant’s evidence as is sometimes the case when an expert’s report is produced with that particular issue in mind (for example in AM (Afghanistan) itself in relation to that appellant’s ‘learning difficulties’). Nevertheless, I am mindful of the central importance placed by the Court of Appeal in AM (Afghanistan) of dutifully following and applying the relevant guidance in relation to “vulnerable” witnesses, such as the appellant. The judge, of course, did not have the benefit of AM (Afghanistan) the judgment in which was not handed down until a month after the judge’s determination was promulgated. Nevertheless, the principles it recognises pre-existed the case, derived, as they are, from guidance including the important joint Presidential Guidance Note. The judge failed to apply that guidance and, again mindful of what the Senior President said at [30] in AM (Afghanistan), I am not persuaded that his failure to do so, which was a clear error of law, was not material.

29. For these reasons, I accept, on the basis of ground 1, that the judge materially erred in law.

30. However, in addition I also accept the essence of ground 2. The judge’s reasoning (at paras 61–66) is relatively brief. In para 66, he clearly doubts the plausibility of the appellant’s account because he could see no reason why, if she were wanted by the authorities, they would not have arrested her before she left Ethiopia on 7 December 2015 or, alternatively, why they did not wait for her return rather than arrest her family.

31. As regards the first point, I accept Ms Profumo’s submission. The appellant’s case was that she only came to the attention of the authorities as a result of her family’s arrest and that her brother (who was a member of Ginbot 7) told them about her. That was, of course, after she left Ethiopia and so there could be no question of them arresting her earlier when they were unaware of her involvement with Ginbot 7. There was, as Mr Hibbs pointed out, some evidence from the appellant (set out at para 65) in her interview which might have suggested that the authorities already knew about her involvement. There was, therefore, potentially at least, conflicting evidence from the appellant. The judge’s brief reasoning in paras 65 and 66 does not seek to grapple with that inconsistency and provide reasons why the judge accepted that the authorities knew about her involvement before she left Ethiopia.

32. In addition, the judge's rhetorical questions, founding an implausibility conclusion that the authorities could have waited for her to return from the UK to arrest her and that there was, therefore, no need to arrest her family, are speculative in the absence of background or other evidence that the Ethiopian authorities were likely to await her return (assuming they would be able to know when she were to return) and that they would not pre-emptively arrest her family to discover her whereabouts or to further their interest in the appellant. In the absence of supporting background evidence, I accept Ms Profumo's submission that the rhetorical question posed by the judge could equally lead to a plausible answer that would favour the appellant.

33. For these reasons, I am also satisfied that ground 2 is established.

Decision

34. Consequently, I am satisfied that the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of a material error of law. That decision cannot stand and is set aside.

35. Given the nature and extent of fact-finding required, the appropriate disposal of the appeal is to remit it to the First-tier Tribunal for a hearing *de novo* before a judge other than Judge Brewer.

36. In the light of the "vulnerability" issues raised in respect of the appellant, although it is a matter for the First-tier Tribunal, it may well be appropriate, as the Senior President suggests in AM (Afghanistan), that a Case Management Review hearing to consider what, if any, evidence concerning the appellant's mental health is to be adduced and, if appropriate, to agree any ground rules for the conduct of the hearing.

Signed

A Grubb
Judge of the Upper Tribunal

26, March 2018